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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-8751

CHARLES McCLELLAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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Petitioner, Charles McClellan, respectfully prays that a Writ of Certiorari be issued to the Appellate Court of Illinois, First District, to review its decision affirming judgment of conviction in the Circuit Court of Cook County, Illinois, adjudging petitioner guilty of the offense of aggravated battery.

JUDGMENTS AND OPINION BELOW

On June 2, 1975, the Illinois Appellate Court, First District, rendered an opinion affirming petitioner's conviction, No. 59713, reported at ..... Ill.App.3d ....., 331 N.E.2d 292 (1975). A copy of the Appellate Court's opinion is attached hereto as Appendix A.* A petition for leave to appeal to the Illinois Supreme Court, timely filed, was denied on September 25, 1975. (No. 47765) (Appendix B)

JURISDICTION OF THIS COURT

The judgment sought to be reviewed (the Illinois Supreme Court's denial of the petition for leave to appeal) was entered on September 25, 1975. This petition for writ of certiorari is timely filed within 90 days from said denial. Jurisdiction of this Court is invoked under Title 28, United States Code, Sec. 1257(3) and Rule 22 of the Rules of this Court.

* Also included as part of Appendix A is Justice Simon's dissenting opinion, 331 N.E.2d at 300, beginning at p. 13a, *infra*.

QUESTIONS PRESENTED FOR REVIEW

1. May a State criminal defendant's Sixth Amendment right to confrontation be limited by application of a State anti-eavesdropping statute, solely on grounds that the impeaching material—prior statements of a crucial prosecution witness inconsistent with the witness' trial testimony —was obtained in violation of said statute?

2. Consistent with due process of law, may a State prosecutor successfully cause exclusion of proffered impeachment evidence consisting of prior inconsistent statements of a crucial prosecution witness on the basis that such evidence was procured by violation of the State anti-eavesdropping statute, where the material thus excluded is exculpatory because of its impeachment value?

3. May the State reviewing court deem waived the question whether a defendant's Sixth Amendment rights were violated by exclusion of proffered impeaching evidence obtained in violation of a State anti-eavesdropping statute, where defense counsel withdrew the proffered evidence only after being himself threatened by the trial court with arrest and prosecution for violation of said statute merely if he offered said evidence to the court?

4. May the withdrawal of proffered evidence under circumstances as set forth in Question 3 be deemed the voluntary waiver by a defendant of his federal constitutional rights?

5. Where the State reviewing court's refusal to decide the merits of petitioner's claimed violation of his Sixth Amendment rights was based on circumstances as set forth in Question 3, should not this Court consider such claim on its merits?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part that:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part that:

> "Section 1. . . . [N]or shall any State deprive any person of . . . liberty . . . without due process of law; . . ."

The statutes involved, Chapter 38, Section 14-1 to 14-5, Ill. Rev. Stat., are set out in Appendix C, pp. 19a-21a, *infra*.

RAISING THE FEDERAL QUESTIONS

Petitioner attempted to cross-examine a State witness concerning prior inconsistent conversations recorded on tape, and the trial court ruled that there could be no cross-examination concerning said conversations because the tapes were inadmissible as in violation of a State eavesdropping statute. The trial court further stated that if counsel for petitioner offered said tapes, counsel himself would be guilty of a crime. In his motion for new trial, petitioner raised the issues of limitation of cross-examination and violation of due process. Petitioner raised in the

Illinois Appellate Court and in his petition for leave to appeal to the Illinois Supreme Court that the trial court's limitation of cross-examination and exclusion of prior inconsistent statements violated defendant's Sixth Amendment rights to confrontation and compulsory process, and to due process of law.

STATEMENT OF THE CASE

Petitioner, Charles McClellan, was indicted for the murder of Starlon McClellan, his daughter, for aggravated battery on his wife, Freddie McClellan, and for aggravated assault upon Della Leslie, his wife's sister. The aggravated assault count was dismissed before trial. After a jury trial, petitioner was found not guilty of murder but guilty of aggravated battery. He was sentenced to two to ten years in the penitentiary.

The evidence adduced at trial is fully set forth in the Appellate Court's opinion, (App. A, pp. 1a-5a), and is not repeated herein to avoid unnecessary duplication.

In summary, it involved an incident between petitioner and his estranged wife, at a car, wherein his daughter and sister-in-law were passengers. At issue at trial were whether the gun was brought to the scene by petitioner or by his wife, who pulled the gun on whom, and whether the shooting was purposeful or accidental during a scuffle for the gun.

During cross-examination of petitioner's wife, counsel for petitioner attempted to question her concerning and impeach her with certain prior inconsistent statements made during a phone conversation between herself and

petitioner, which petitioner had recorded. The court precluded such inquiry. The following occurred:

"Q. What did you say to him?

A. I told him, well, no, I weren't coming back home. I said, 'You never stay at home and you don't treat me right and I don't want to come back home.'

Q. Now, during these conversations, did you use any foul language against him?

A. No.

Q. Did you ever threaten him?

A. No.

Q. If I told you we had a tape of those—

Mr. Schaffner: Objection.

The Court: Objection sustained.

May we go off to the side one minute?

Mr. Goldstein: Yes.

(The following proceedings were had outside the hearing of the jury:)

Mr. Goldstein: I have the tapes.

The Court: You have tapes.

Mr. Schaffner: I'd like to know why they are not in our answer to discovery. They were referred to in the preliminary hearing.

Mr. Goldstein: I just got them, I'll give them to you now, I'll give you a chance to listen to them, I have got them right here.

The Court: Plus the fact, number one, it involves a violation of law.

Mr. Goldstein: Not where the facts are a murder charge as to the question of who did what, you can go into any motive.

The Court: Well, be that as it may, all I'm questioning is whether or not there are tapes.

Mr. Goldstein: There are tapes and I'd give them to the State's Attorney.

The Court: That is beside the point. Right now there will be no reference to the tapes in front of the jury at this point.

Mr. Goldstein: Yes.

The Court: Something might come in later, but nothing now.

Mr. Goldstein: All right." (Tr. 55-56)•

Subsequently, counsel for petitioner offered those tapes to the State as a prerequisite to having them offered in evidence. The court advised petitioner's counsel that by offering said tapes he, counsel, could be arrested. Threatened with arrest, counsel withdrew the offer. The following occurred:

"Mr. Goldstein: If the Court please, in the case of People vs. McClellan, my name is Herbert R. Goldstein, and represent, for the record, the defendant.

At this particular time would you mark these Defendant's Exhibits 1, and 2, for identification, please.

(Thereupon said items were marked Defendant's Exhibits 1, and 2, for identification, respectively, by the reporter.)

Mr. Goldstein: At this particular time I am tendering to the State Defendant's Exhibit 1, and 2, for identification, which consist of two tapes, which will be used for impeachment of one of the principal State witnesses, Freddie McClellan.

I didn't put it in discovery because we didn't know what she was going to say along those lines but in lieu

• "Tr." refers to the Transcript of Proceedings at trial, incorporated as part of the Record on Appeal in the State proceedings.

of the threat, they said she had not sworn or threatened and we can prove this type by proper legal means.

I have given them time to listen or look at them.

The Court: Before you do anything, Counsel, it is my duty to warn you about the statute, isn't it?

Mr. Goldstein: Well, this is not the statute that we are discussing.

The Court: Let's get the statute. You may be in violation of the law even by turning them over to anyone.

Mr. Goldstein: Well, I have done it with the consent of my client.

The Court: But you don't have the consent of the party—

Mr. Schaffner: Would you want Chapter 38?

The Court: Yes.

I hate to see you arrested as a result of you turning this over to the Court.

Mr. Goldstein: Then I will learn more.

I am turning them over with the consent of the defendant in this cause, who wants to use these tapes for impeachment.

(Whereupon after an interval of time the following proceedings were had, to-wit:)

Mr. Goldstein: All right. On behalf of my client, in lieu of what Your Honor said, he is withdrawing the tapes and not using them.

The Court: Not using them?

Mr. Goldstein: Right.

The Court: All right." (Tr. 155-57)

During final arguments, the prosecution asserted that a crucial issue was the credibility of the witnesses.

REASONS FOR GRANTING THE WRIT

I.

A defendant in a criminal case is denied his Sixth Amendment right to confrontation where he is prevented from impeaching a crucial prosecution witness with prior inconsistent statements on grounds that said impeaching statements were recorded in violation of a State eavesdropping statute.

Petitioner's wife was a crucial prosecution witness. Her credibility was strongly at issue. Petitioner attempted to impeach her testimony with prior inconsistent statements she made to him over the phone which he had recorded. The trial court prevented petitioner from impeaching this witness with her prior inconsistent statements on grounds that the recording was made in violation of the State eavesdropping statute, Chap. 38, secs. 14-1 to 14-5, Ill. Rev. Stat.[1] (Tr. 55-56)

Preventing impeachment violated petitioner's Sixth Amendment right to confrontation.

> "The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him' . . . 'Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.' . . ." *Davis* v. *Alaska*, 415 U.S. 308, 315 (1974).

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[1] Making or divulging the recording was not a violation of the federal wiretapping provisions, 18 U.S.C. 2511, 47 U.S.C. 605, or of the Fourth Amendment to the United States Constitution. *United States* v. *White*, 401 U.S. 745 (1971).

This right cannot be limited by a State eavesdropping statute, where exclusion of evidence obtained in violation of the statute results in permitting a witness' perjury to go uncorrected. The interrelationship of a defendant's federal constitutional right to confrontation to a competing State interest—either to a State statute or to a State evidentiary rule—recently has been considered by this Court in *Davis* v. *Alaska*, 415 U.S. 308 (1974), and *Chambers* v. *Mississippi*, 410 U.S. 284 (1973).

In *Davis*, the Court held:

> "[T]he right of confrontation is paramount to the State's policy of protecting judicial offenders." 415 U.S. at 319.

In *Chambers*, the Court held that a State "evidentiary rule" could not override defendant's Sixth Amendment rights. The Court stated:

> "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitution, and helps assure the 'accuracy of the truth-determining process.' *Dutton* v. *Evans*, 400 U.S. 74, 89 . . . (1970); *Bruton* v. *United States*, 391 U.S. 123, 135-137 . . . (1968). It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' *Pointer* v. *Texas*, 380 U.S. 400, 405 . . . (1965). Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. *E.g.*, *Mancusi* v. *Stubbs*, 408 U.S. 204 . . . (1972). But its denial or significant diminution calls into question the ultimate ' "integrity of the fact-finding process" ' and requires that the compelling interest be closely examined. *Berger* v. *California*, 393 U.S. 314, 315 . . . (1969)." 410 U.S. at 295.

Congress expressly has determined that there is no federal interest in preventing one party from recording a conversation with another party, 18 U.S.C 2511, 47 U.S.C. 605, and this Court has held that such activity does not contravene the Fourth Amendment. *United States* v. *White*, 401 U.S. 745 (1971).

Nor is the State's interest in preventing eavesdropping greater than its interest in prohibiting perjury, as is evident from the respective penalties. Violation of the State eavesdropping statute[2] is a Class A misdemeanor,[3] punishable by up to one year,[4] while perjury[5] is a Class 3 felony,[6] punishable by one to ten years.[7]

Irrespective of the State's interest in prohibiting such recording, it is doubtful if the State has an interest in permitting perjury to go uncorrected. In *United States* v. *Caron*, 474 F.2d 506 (5 Cir. 1973), the court, considering the analogous federal statute, held that illegally obtained recordings—although not admissible as direct evidence—are admissible to impeach a defendant. The court there relied on this Court's decisions in *Walder* v. *United States*, 347 U.S. 62 (1954), and *Harris* v. *New York*, 401 U.S. 222 (1971). These decisions demonstrate that evidence obtained illegally in violation of the Fourth Amendment (*Walder*), or the Fifth and Sixth Amendments (*Harris*), can be used to impeach a defendant.

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2 Chap. 38, sec. 14-2, Ill. Rev. Stat.
3 Chap. 38, sec. 14-4, Ill. Rev. Stat.
4 Chap. 38, sec. 1005-8-3(a)(1), Ill. Rev. Stat.
5 Chap. 38, sec. 32-2, Ill. Rev. Stat.
6 Chap. 38, sec. 32-2(d), Ill. Rev. Stat.
7 Chap. 38, sec. 1005-8-1(b)(4), Ill. Rev. Stat.

Since not even the Fourth, Fifth or Sixth Amendments can be used to shield perjury, surely a State statute cannot thus be used. To hold otherwise would be to raise such State statute to a position of greater importance than these most crucial amendments to the United States Constitution.[8]

When, as in *United States* v. *Nixon*, 418 U.S. 683, 707-12 (1974), the legitimate needs of the fair administration of criminal justice are held to outweigh even a presidential privilege, a State statute designed to prohibit eavesdropping cannot be used by a trial court to shield conversations which may on cross-examination impeach a prosecution witness or establish the defendant's innocence.

In ruling the proffered impeachment evidence inadmissible—thus improperly limiting petitioner's Sixth Amendment rights—solely on grounds of the State statute, the State court has decided a federal question of substance, involving exercise of Sixth Amendment rights, not previously determined by this Court. Since the State court's decision is probably not in accord with relevant analogous decisions of this Court, certiorari should be allowed.[9]

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[8] See *Beaber* v. *Beaber*, 41 Ohio Misc. 95, 322 N.E.2d 910 (1974), a divorce action wherein the court held admissible, to impeach plaintiff's trial testimony, her statements in telephone conversations which were recorded by defendant in violation of a State law comparable to the Illinois statute.

The denial of impeachment based on the evidence having been obtained by violation of a criminal provision by a private citizen would also be contrary to the holding of *Burdeau* v. *McDowell*, 256 U.S. 465 (1921) (holding admissible as substantive evidence in chief, evidence obtained by private citizen under circumstances where, had he been a government agent, the Fourth Amendment would have been violated).

See Justice Simon's dissenting opinion in the case at bar, 331 N.E.2d at 300, App. A, pp. 13a-17a.

[9] Per Supreme Court Rule 19.1(a).

II.

The exclusion of the tapes violated due process.

The due process clause of the United States Constitution requires the prosecution both to turn over prior inconsistent statements of a prosecuting witness, *Giles* v. *Maryland*, 386 U.S. 66 (1967); *Brady* v. *Maryland*, 373 U.S. 83 (1963), and to correct knowingly false statements of prosecution witnesses. *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Giglio* v. *United States*, 405 U.S. 150 (1972).

So too, due process cannot permit the prosecution to cause the exclusion of prior inconsistent exculpatory statements on the basis that petitioner obtained them in violation of a State criminal statute. Although the prosecution may elect to prosecute for such violation, it cannot, consistent with due process, obtain a conviction by succeeding in its efforts to have the trial court exclude the prior inconsistent statements of a prosecution witness which are exculpatory by virtue of their impeachment value.

Certiorari should be allowed so that this Court may consider the due process aspects of petitioner's claim.

III.

Withdrawal of offered evidence under the threat that the lawyer and client will be arrested if they offer said evidence sufficiently preserved the issue of whether exclusion of said evidence violated petitioner's constitutional rights.

The Illinois Appellate Court refused to consider the issue whether petitioner was denied his constitutional rights of confrontation and due process (with one judge dissenting),[10] disposing of the issue on the basis of a State proce-

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[10] See App. A, pp. 13a-17a.

dural ground, *i.e.*, that withdrawal of the tapes under threat of arrest waived any error in their exclusion. Such refusal of the State court to consider the issue on its merits does not bar this Court from considering it. For this Court has "consistently held that the question of when and how defaults in compliance with State procedural rules can preclude our consideration of a federal question is itself a federal question." *Henry* v. *Mississippi*, 379 U.S. 443, 447 (1965).

The State procedural grounds relied on by the Illinois Appellate Court should not, under the circumstances here, bar consideration of the denial of petitioner's constitutional rights.

Here, initially the court prevented the defense from cross-examining the witness concerning the statements contained on the tapes. (Tr. 55-56) Then, the next day, when counsel moved to offer the tapes, the court advised counsel, "I hate to see you arrested as a result of your turning this over to the court." (Tr. 156) Only under threat of arrest were the tapes withdrawn.

Withdrawal of the defense request to have the tapes admitted after the court had ruled them inadmissible and under threat of arrest is not such acquiescence as may be deemed a voluntary waiver of a constitutional right. *Cf. Bumper* v. *North Carolina*, 391 U.S. 543 (1968).[11]

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[11] In *United States* v. *Lewis*, 482 F.2d 63 (D.C. Cir. 1973), the court held that where the trial judge ruled, on prosecution request, that any defense character witnesses could be questioned by the prosecution as to whether they had heard of defendant's recent arrest on a narcotics charge, defendant was not precluded from raising, on appeal, issue as to correctness of trial judge's ruling because after the ruling, defense counsel decided not to use character witnesses.

To hold that to preserve the issue counsel had to subject himself to arrest is contrary to the prevailing view, that counsel must abide by instructions of the court and rely on his remedy on appeal.

> "We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but absent a stay, to comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect. *Howat* v. *Kansas*, 258 U.S. 181, 189-190 . . . (1922). *Worden* v. *Searls*, 121 U.S. 14 . . . (1887). The orderly and expeditious administration of justice by the courts requires that 'an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.' *United States* v. *United Mine Workers*, 330 U.S. 258, 293 . . . (1947). This principle is especially applicable to orders issued during trial. *E.g.*, *Illinois* v. *Allen*, 397 U.S. 337 . . . (1970). Such orders must be complied with promptly and completely for the alternative would be to frustrate and disrupt the progress of the trial with issues collateral to the central questions in litigation." *Meyers* v. *Maness*, 419 U.S. 449, 42 L.Ed.2d 574, 583 (1975).

Here, there was no meaningful alternative to objecting to the court's ruling. For one could object only to the court's order of exclusion, and the court stated counsel could be arrested merely for offering such evidence to the court.[12]

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[12] Per the Illinois statute, divulgence of an illegally recorded communication is an offense as well. Chap. 38, sec. 14-2(b), Ill. Rev. Stat.

The court's threat to have defense counsel arrested merely for offering such evidence to the court denied petitioner his constitutional right to effective assistance of counsel by creating an impossible conflict between the respective interests of petitioner and defense counsel. Petitioner was charged with murder and aggravated battery[13]—both carrying possible penalties far greater than the one year possible sentence for violation of the State eavesdropping statute[14]—and hence petitioner himself might have elected to have said evidence offered. He might well have been willing to risk the possible one year eavesdropping statute penalty in order to attempt to have the impeaching evidence admitted and thus possibly to avoid conviction for murder or aggravated battery.

But how can counsel properly advise petitioner as to his alternatives when counsel *himself* is threatened with being charged and prosecuted merely for offering such evidence to the court?

This court-created conflict deprived petitioner of his constitutional right to effective assistance of counsel. *United States* v. *Glasser*, 315 U.S. 60 (1942).

Since the decision to withdraw the evidence was made after a court-created conflict between defense counsel and

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13 The possible sentence for murder, Chap. 38, sec. 9-1, Ill. Rev Stat., is a minimum of 14 years to any number of years. Chap. 38, sec. 1005-8-1(b)(1). For aggravated battery, Chap. 38, sec. 12-2, Ill. Rev. Stat., the possible penalty is 1 to 10 years. Chap. 38, sec. 1005-8-1(b)(4).

14 See p. 11, footnotes 2, 3 & 4, *supra*, and accompanying text.

petitioner, this withdrawal cannot be deemed the voluntary action of petitioner.[15]

Similarly, under these circumstances, where the trial court had made his position clear, and counsel had every reason to believe that any further reference to the tapes would cause his own arrest, the points raised in the motion for new trial that: (a) the trial court erred in sustaining objections to questions propounded by defense counsel, and (b) that defendant was denied provisions of the Fourteenth Amendment, including denial of due process, sufficiently preserved the error for review. See *Chambers* v. *Mississippi*, 410 U.S. 284, 290 n.3 (1973).

The purpose of the State procedural rule that objection must be preserved by reference in a motion for new trial was here satisfied, in that the trial judge had made his position most clear. Hence, there is no compelling interest in the State procedural rule sufficient to override the paramount interest of petitioner's constitutional right to confrontation. *Chambers* v. *Mississippi*, 410 U.S. 284 (1973).

This Court therefore has jurisdiction to consider the merits of petitioner's contentions concerning the violation of his constitutional rights as set forth in Points I and II of this Petition.

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15 See *People* v. *Richardson*, 7 Ill. App. 3d 367, 287 N.E.2d 517 (1972), where the Illinois Appellate Court held that defendant's plea was not voluntary where it was based on advice of counsel having a conflicting interest. See dissenting opinion in case at bar, App. A, pp. 13a-17a.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court issue a Writ of Certiorari to review the judgment of the Illinois Appellate Court, First District.

Respectfully submitted,

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APPENDIX A

**People Of The State Of Illinois,
Plaintiff-Appellee,
v.
Charles McClellan, Defendant-Appellant.
No. 59713.**

Appellate Court of Illinois,
First District, First Division.
June 2, 1975.

GOLDBERG, *Justice:*

The familiar but lethal combination of a domestic quarrel and a loaded pistol was the cause of the tragic events disclosed by this record. Charles McClellan (defendant) was indicted for the murder of Starlon McClellan, his daughter (Ill. Rev. Stat. 1971, ch. 38, par. 9-1 (a)(2)); aggravated battery on his wife, Freddie McClellan, (Ill. Rev. Stat. 1971, ch. 38, par. 12-4 also par. 12-4 (b)(1)) and for aggravated assault upon Della Leslie, his wife's sister (Ill. Rev. Stat. 1971, ch. 38, par. 12-2 (a)(1).) The count for aggravated assault was dismissed before trial. After a jury trial, defendant was found not guilty of murder but guilty of aggravated battery. He was sentenced to two to ten years in the penitentiary. Defendant appeals.

In this case, defendant presents six points of alleged reversible error: the court advised the jury that defendant would assert the defense of accident and thus shifted the burden of proof to him; the comments by the trial court prior to trial which advised the jury that defendant would testify, which in essence forced him to do so; refusal of the trial judge to allow counsel for defendant to question prospective jurors directly; unfairly preventing defense counsel from using evidence

favorable to the defendant; not holding an *in camera* hearing into the value, validity and admissibility of evidentiary tapes sought to be introduced by defendant; and the calling by the State of defendant's wife for a second time, only to identify the photo of her deceased daughter which was done solely to prejudice the jury. Defendant raises no point regarding the sufficiency of the evidence to prove him guilty of aggravated battery beyond a reasonable doubt. The State has taken the position that none of these issues present reversible error which would require reversal of the judgment.

Although the sufficiency of the evidence of guilt is not questioned, a factual statement is essential. Freddie McClellan testified that she was the wife of defendant. Their daughter, Starlon, was born September 28, 1960. The parties lived in Cairo, Illinois. They separated on August 19, 1972, and the wife and daughter went to live with the former's sister, Della Leslie, in Chicago.

On September 16, 1972, the wife, the daughter and the former's sister were driving in an automobile in Chicago. The sister was driving and the wife sat in the front right-hand seat. The daughter, then some 12 years of age, sat in the right rear seat. They saw defendant driving an automobile in the opposite direction. The wife testified that then she noticed defendant following them. When they stopped at a traffic light, defendant came over to the left side of the automobile and told the sister to pull over as he wished to speak to his wife. At the wife's request, her sister disregarded this and proceeded. When they stopped at another light, defendant came out of his automobile, which he had parked to their right, and walked over to them. He asked to speak to the wife and she responded that there was nothing to talk about. The wife testified that defendant reached inside of his coat with his right hand, pulled out a pistol and

fired a shot which struck her behind the right ear and a second shot which struck her in the right shoulder. She then slumped over and heard some more shots. She was then taken to the hospital where she remained until December 20, 1972, and then to a rehabilitation center where she was at the time of trial in February of 1973. She denied that she had ever touched defendant's hands or struggled with him for possession of the gun.

Della Leslie, the sister, corroborated this testimony and testified that after firing the two shots which wounded the wife, the husband stuck his hand inside the front window and shot his daughter once. The witness got out of the automobile and heard two more shots. She then reentered the car and drove to obtain assistance.

The daughter entered the hospital on the day of the shooting. She subsequently died as a result of a bullet wound which had severed her spinal cord and caused other injuries.

Defendant called a clerical witness who testified without objection to his good reputation for being a non-violent person and for truth and veracity. He also called his employment supervisor to give opinion evidence regarding his truth, veracity and honesty. He also called a minister, an aunt of defendant, who testified that she had a telephone conversation after the incident with Della Leslie who told her that there had been a scuffle over a gun and that Freddie McClellan and Starlon had been shot. This was partly corroborated by the minister's secretary who had made the call and listened to the conversation. She testified that Della said that there had been a "tussle" over a gun between defendant, the wife and the daughter.

Defendant testified in his own behalf. He agreed that the parties had lived together near Cairo and that his wife had left and gone to Chicago with the daughter sometime in August of 1972. He testified that he bought the pistol on August 30, 1972, but that he never saw it again until September 16, 1972. On August 30, 1972, the gun was in a dresser drawer at home. He went to Chicago on September 15, 1972, in connection with his employment. He did not have the gun in his possession then. He encountered the automobile driven by Della Leslie on September 16, 1972, only by chance. He drove up to the side of their car and asked Della Leslie to stop as he wished to speak to his wife. She responded with a profanity and proceeded. At another light, he got out of his automobile, approached the other car where his wife was seated and said that he would like to talk to her. She responded, "You are fixing to get your F'g head blown off." Defendant asked if the daughter could ride along with him. He did not have the gun when he approached the car. His wife then raised up the gun in her hand and when he saw it, he grabbed it. The little girl jumped up and grabbed hold of the gun at which time it went off. He grabbed the gun back and "it fired off two more shots." His wife's hand then went limp and he had the gun in his hand. Della Leslie then drove off in the automobile and he was standing with the gun. In due course he went over to the police station, surrendered and gave them the gun.

The gun is a revolver which holds five cartridges. It was empty when the police received it. Defendant testified that he had removed the bullets or shells which remained. Ballistic evidence confirmed that this was the gun which had caused the death of the daughter. A police officer testified that, after being properly advised of his rights, defendant stated that he had the gun on his

person in his waistband when he went up to the car. This was because he had trouble with his wife and he was afraid that she would shoot him. He pulled the gun out of his waistband and his daughter reached from the back seat so that the gun was accidently discharged. Defendant stated that he could not recall how many shots had been fired. Defendant denied making this statement to the police.

Defendant first points out that when the trial judge made a preliminary statement to the prospective jurors, he told them that defendant had filed an answer as part of pretrial discovery in which he asserted that his defense would be that he was not guilty but that the mishap was caused by the acts of Freddie McClellan and that the death of the daughter was an accident caused by these acts. Defendant urges that this had the effect of shifting the burden of proof to him.

After examining all of the remarks made by the court on *voir dire*, we cannot agree as to the effect of this portion of the statement by the court. On a number of instances, the trial judge properly emphasized that the burden of proof rested on the State and that defendant had no need to testify. In addition, in the opening statement made by defendant's counsel to the jury, he described the occurrence as an accident in quite a similar manner. Furthermore, an examination of the given instructions shows that the court properly instructed the jury regarding the presumption of innocence and the burden of proof which rested on the State throughout the case. (IPI-Criminal 2.03). We cannot agree that the jury was under any illusion or misapprehension as regards the burden of proof.

We will also point out here, as we will concerning additional contentions, that defendant made no objection to

this portion of the preliminary statement by the court; did not ever move the court to discharge the jury for this reason and did not include any reference to this alleged error in his written motion for a new trial. It is therefore clear that, even if any error did exist in this regard, it has been waived by failure to object and failure to include the matter in the motion for new trial. See *People v. Studdard*, 51 Ill. 2d 190, 198, 281 N.E. 2d 678, regarding failure to object; *People v. Hairston*, 46 Ill. 2d 348, 366, 367, 263 N.E. 2d 840, on failure to include the matter in the written motion for new trial; also, *People v. Davis*, 18 Ill. App. 3d 793, 797, 310 N.E. 2d 682 and *People v. Smith*, 17 Ill. App. 3d 494, 496, 497, 308 N.E. 2d 257, covering both of these points.

The second point raised by defendant is actually an extension of his first claim regarding the initial statements of the trial court. He urges that as a result his "counsel had no choice but to place him on the stand." The one and only authority cited by defendant in support of this contention is *People v. Weinstein*, 35 Ill. 2d 467, 220 N.E. 2d 432. That case is completely inapplicable. There, the Supreme Court reversed a conviction for murder because of repeated argument by the prosecutor to the jury that it was the duty of defendant to "create a reasonable doubt of her guilt before she can be acquitted." (35 Ill. 2d 467, 469, 220 N.E. 2d 432, 433.) This continued although the court sustained defense objections upon some 17 occasions.

Virtually the sole argument in defendant's brief in support of this proposition is that the only witnesses to the incident were the wife, her sister and the defendant. That very statement convinces us that the situation involved in the case made it essential for defendant to testify in his own behalf. Reading of this record

demonstrates that the entire defense was well prepared and planned and that testimony by defendant in his own behalf displayed the use of good strategy by his counsel. The verdicts of the jury demonstrate the validity of this proposition.

The third issue raised by defendant is that he was prejudiced by the trial court's refusal to allow counsel to question prospective jurors. The record shows only that the trial judge initiated the *voir dire* by reading the indictment and making a general statement to the entire array. There is no further direct record of the balance of the proceedings on selection of the jury. The record does show statements by the court and counsel on defendant's motion to discharge the jury immediately before they were sworn and on oral argument on defendant's written motion for new trial. From this we learn indirectly that the trial judge permitted counsel for both sides to ask questions of all of the jurors collectively. The court also suggested that the attorneys submit additional questions in writing to be put to individual jurors by the court. No such questions were submitted by defendant's counsel. The record also shows indirectly that two jurors were reluctant to serve and, although their answers showed that they were qualified, the court excused them for cause on motion of defendant. The record does not reflect the questions put to any of the jurors, collectively or individually, their answers or whether defendant made additional challenges for cause or excused any juror by peremptory challenge.

Selection of the jury is governed by Supreme Court Rule 234, Ill. Rev. Stat. 1973, ch. 110A, § 234 (50 Ill. 2d R. 234) which provides: "The judge shall initiate the *voir dire* examination of jurors * * *." "The parties or their attorneys shall be allowed a reasonable opportunity to supplement such examination * * *." The con-

stitutionality of a similar restriction upon examination of individual jurors by the attorneys has been established. (*People v. Lobb*, 17 Ill. 2d 287, 161 N.E. 2d 325.) However, it has been repeatedly held that "direct questioning of prospective jurors by the parties or their attorneys during *voir dire* examination is not to be totally prohibited." *People v. Turner*, Ill. App., 326 N.E. 2d 425, (First District, General No. 60135, filed March 20, 1975) citing Lobb; also *People v. Carruthers*, 18 Ill. App. 3d 255, 309 N.E. 2d 659; *Street v. Finney*, 9 Ill. App. 3d 638, 292 N.E. 2d 553. See also *People v. Willis*, 26 Ill. App. 3d 518, 325 N.E.2d 715, First District, filed February 6, 1975.

However, it does not follow that each and every violation of the rule in selection of the jury requires reversal of an ensuing conviction. It has been held by this court that there is no prejudicial error without evidence that defendant's attorney was "prevented from discovering any fact or reason why a prospective juror might be biased or lack the essential qualifications for service as a juror in the case." *People v. Turner*, Ill. App., 326 N.E. 2d 425, quoting from *People v. Carruthers*, 18 Ill. App. 3d 255, 261, 309 N.E. 2d 659.

In the case before us, there is no showing of prejudice of any kind or to any degree. Defendant's brief does not demonstrate that he was prejudiced in any manner or that his trial was unfair. The record before us shows only that counsel for defendant failed to submit supplemental questions to the trial court. The record shows no request to the court to permit direct questions in any situation or regarding any specific field of inquiry. From this, we can only conclude that the questioning by the court was sufficient to show the need for a challenge for cause or to permit "an intelligent exercise of the peremptory right." (See *Lobb*, 17 Ill. 2d 287,

302, 161 N.E. 2d 325, 334.) The added fact that the trial judge excused two jurors for cause, despite the fact that their answers showed them qualified to serve, tends strongly to show that the process of selection by the court was fair and impartial in this particular case. This conclusion is cogently supported by the verdict of not guilty of murder which demonstrates fair and impartial consideration by the jury.

Defendant's brief makes no sufficient showing of prejudice in any specific manner. As this court has recently held (*People v. Turner*, Ill. App., 326 N.E. 3d 435):

> * * * [I]t is incumbent upon the objecting party to show that the prohibition against direct questioning imposed by the court prevented him from discovering any fact or reason why a prospective juror might be biased or lack the essential qualifications for service as a juror, or otherwise precluded him from an intelligent exercise of the right to challenge for cause or peremptorily.

In the case before us, we conclude that defendant did receive a fair and impartial trial. However, we wish to make the point clear that, pending amendment of Rule 234, which we understand is presently being considered by the Supreme Court, it is the duty of all trial judges to initiate the *voir dire* examination and to allow the parties or their attorneys a reasonable opportunity to supplement such examination in accordance with the clear dictates and requirements of the rule. Until the rule is modified or amended, it should be respected and observed and no trial judge should totally prohibit direct questioning of prospective jurors by the parties or their attorneys.

Defendant's next claim, that the trial court prevented him from using favorable evidence, arises from defense counsel's statement that he had possession of certain

tapes which allegedly contain telephone coversations between defendant and his wife. This contention requires reference to the record. Counsel for defendant cross-examined the wife regarding certain alleged telephone conversations between her and defendant shortly after the wife left their home. Defense counsel then asked the witness if she had ever threatened defendant and received a negative answer. He then stated: "Q. If I told you we had a tape of those—". An objection was made by the State and sustained and a conference was had between the court and counsel. Defense counsel stated that he had "the tapes." The State's Attorney asked why they were not referred to in the discovery documents. Defense counsel responded that he had just received them and he offered the State's Attorney a chance to listen to them. The court stated that these tapes involved a violation of law; and, after some additional conversation, the court stated that there should be no reference to the tapes in the presence of the jury at this point. The court then stated: "Something might come in later, but nothing now." and defense counsel replied, "All right."

At a later time, also out of the presence of the jury, defense counsel asked that the tapes be marked for identification as defendant's exhibits. The court told counsel for the defense that it was the court's duty to warn counsel that it might be a violation of law if he were to turn the tapes over to anyone. After additional discussion, there was a conference off the record. Counsel for defendant then stated, "All right. On behalf of my client, in lieu of what Your Honor said, he is withdrawing the tapes and not using them." The court responded to defense counsel, "Not using them?" and counsel replied, "Right." The court then stated, "All right," and trial proceeded.

In defendant's brief he states that the tapes were of conversations had by the wife "after the shooting took place." This statement is not supported by the trial record. In our opinion, this record shows no error. Counsel for defendant specifically announced that he would not use the tapes. The tapes were never offered in evidence. No offer of proof was ever made. The point, if one ever existed, was thus withdrawn; quite analogous to the withdrawal of an objection by a defendant. *People v. Jones*, 47 Ill. 2d 135, 140, 265 N.E.2d 125.

In addition, no description of the alleged contents of the tapes appears in this record. All that counsel for defendant ever did was to have the tapes marked for identification and then tender them to the State's Attorney for his examination. He then immediately withdrew the use of the tapes. We find no error of any kind in this record. In this instance also, failure of defendant to include this point in the motion for new trial evidences a waiver in accordance with the authorities above cited. Cases such as *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, and *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 2d 1, have no application here.

In our opinion, the examination of the record above set forth effectively disposes of defendant's fifth argument to the effect that the court should have had an *in camera* hearing into the admissibility of the tapes. No such hearing by the court was requested or even suggested by defendant. Also, the statement in this portion of defendant's brief that the trial court erred by preventing adequate cross-examination of the wife is not supported by the record.

The sixth and last contention of defendant is that prejudicial error occurred when the wife was called to the

stand for a second time to identify a photograph of the deceased. She broke down and wept in the presence of the jury. After the initial testimony of the wife and of her sister, and after ballistics and other testimony, the State's Attorney recalled the wife for the sole purpose of having her identify a designated photograph as that of her deceased daughter. The record shows that the witness stated, "Yes, that is Starlon, that is my baby. I don't have my baby any more." The jury was immediately excused and the record shows the witness repeating, "Oh, Starlon, my baby." Counsel for defendant requested that the record indicate that the witness "broke down on the stand in front of the jury." No motion of any kind was made by defendant but the matter was included in the motion for new trial.

The record shows that the photograph of the deceased, identified by the wife, was a necessary piece of probative evidence. The pathologist who testified to the cause of death identified the body which he had examined only by use of this photograph. There was a legitimate need for the wife to identify the picture as a foundation for the essential testimony of the pathologist. When there is a proper use or need for identification of a photograph, collateral objections, such as the gruesome character of the picture, are not availing. (*People v. Speck*, 41 Ill. 2d 177, 202, 242 N.E. 2d 208.) In addition, there is nothing in this record which proves or even suggests that the State's Attorney recalled this witness and had her identify the photograph for any reason beyond the necessity of creating a proper foundation for the testimony of the pathologist. At this point, also, it is pertinent again to repeat the statement that the acquittal of the defendant on the charge of murder shows that the jury gave the case a completely fair and unbiased consideration.

We have made a careful and detailed examination of this record. We find no reversible error. The judgment is affirmed.

Judgment affirmed.

BURKE, P.J., concurs.

SIMON, J., dissents.

SIMON, *Justice* (dissenting):

The court relies entirely on procedural grounds in affirming the aspect of this case dealing with the taped conversations. It determined that the defendant's attorney voluntarily withdrew the tapes thereby obviating the need for a ruling by the trial court on their use, that the defendant failed to make an offer of proof so that the record in this court could show whether the tapes would have been helpful to the defendant, and that the defendant failed to specify in his written motion for a new trial error in excluding the tapes thereby waiving that issue. I do not agree with this view of the record and, therefore, would reach the constitutional issues implicit in denying the defendant, on the basis of a state statute, the use of the tapes to impeach his wife when she testified against him.

When the tapes were first referred to by defendant's counsel in cross-examining the wife, the State objected and the objection was sustained. The State's own interpretation of the record as reflected by the following statements appearing in its brief indicates that the tapes were excluded by the trial court:

"The State objected to the attempted introduction of the tapes and the trial court sustained that objection."

"The trial court refused to allow the tapes to be used, stating that the tapes were violative of Illinois law."

The day after the trial court sustained the State's objection to reference to the tapes, defendant's counsel asked that the tapes be marked as defendant's exhibits. Thereupon, even though the State made no objection, the trial court informed counsel it was the court's duty to warn counsel about the Illinois eavesdropping statute,[1] that counsel might be violating the law by turning the tapes over to the trial court or the prosecutor, and that the court would "hate to see you [defendant's counsel] arrested as a result of you turning this over to the court."

It was the responsibility of the trial judge to permit the use of any proper evidence which might have assisted the court and the jury in arriving at the truth and in assuring that the defendant would have a fair trial. Instead, the trial court with good intentions, but in a misdirected effort to protect counsel from violating the eavesdropping statute, chilled defendant's offer of the tapes which were being presented for the purpose of impeaching a crucial prosecution witness. The trial court erred in emphasizing the eavesdropping statute rather than the defendant's constitutional right to confront the witness against him and in discouraging the use of the tapes by suggesting to defendant's counsel that he was

[1] Ill. Rev. Stat. 1973, ch. 38, § 14-2(b) provides:

"A person commits eavesdropping when he:

"(b) Uses or divulges, except in a criminal proceeding, any information which he knows or reasonably should know was obtained through the use of an eavesdropping device."

exposing himself to criminal liability. The record shows that only after receiving the trial court's warning about the pitfalls of the eavesdropping statute did defendant's counsel inform the court he was withdrawing the tapes and not using them. In view of the trial court's warning, this was not a voluntary withdrawal. Certainly, it was not the equivalent of the withdrawal of an objection to evidence of a previous conviction which this court relies on in citing *People v. Jones* (1970), 47 Ill. 2d 135, 140, 265 N.E. 2d 125. In that case defendant's attorney after initially objecting, withdrew his objection, saying, "Oh well, let it go in. It doesn't make any difference."

Although the motion for a new trial did not specifically mention the tapes, it did refer to error committed by the trial court in sustaining objections by the State to questions propounded by defense counsel and in denying due process to the defendant. If the issue of improper exclusion of the tapes was not raised by the motion for a new trial, this is a proper case for the application of Supreme Court Rule 615(a) relating to the consideration of plain errors or defects affecting substantial rights not brought to the attention of the trial court, particularly since, as pointed out below, the exclusion of the tapes may have deprived the defendant of sixth amendment rights. *People v. Pickett* (1973), 54 Ill. 2d 280, 282-283, 296 N.E. 2d 856.

The conclusion reached by this court that the case should not be remanded because no offer of proof was made and no description of the alleged contents of the tapes appears in this record overlooks the circumstances under which the tapes were excluded. The failure of the defendant to make a formal offer of proof is clearly excusable in the face of the trial court's admonition about the eavesdropping statute, since even an offer of proof would have constituted a violation of the statute as the

trial court viewed it and explained it to defense counsel.

This court's decision is not supported by procedural shortcomings, and the court should, therefore, have considered whether denying defendant use of the tapes deprived him of constitutional rights.

If there was any evidence on the tapes helpful to the determination of the guilt or innocence of the defendant, their use is constitutionally mandated and cannot be blocked by the eavesdropping statute. The State relies on *People v. Kurth* (1966), 34 Ill. 2d 387, 216 N.E. 2d 154, which held that illegal tapes cannot be used by the State against a defendant in a criminal prosecution. In this case, the defendant was seeking to use the tapes in question in his defense.

The exclusion of the tapes because of a state statute preventing their use by one accused of crime as an aid to his defense deprives the accused of his constitutional rights of due process and to confront witnesses against him. By its interference with the effort of the defendant to contradict the testimony of his wife, the court denied the defendant his sixth amendment rights, even though the court was relying on Illinois statutes making the tapes which defendant was seeking to use or their recording or use illegal. In *Davis v. Alaska* (1974), 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 2d 347, a crucial prosecution witness was shielded by a protective order prohibiting any reference in cross-examination to his juvenile record. The protective order was granted on the basis of a state statute rendering juvenile records inadmissible in non-juvenile courts. The Supreme Court held that the interest of the state in protecting the anonymity of juvenile offenders is subservient to the sixth amendment right to full and effective cross-examination of a witness, and that the state courts erred in concluding

that the cross-examination as limited by the protective order was adequate. Similarly, the right of a defendant to confront a witness against him with adequate cross-examination overrides the interest of the State in providing protection against eavesdropping.

When, as in *United States v. Nixon* (1974), 418 U.S. 683, 707-712, 94 S.Ct. 3090, 41 L.Ed. 2d 1039, the legitimate needs of the fair administration of criminal justice are held to outweigh even a presidential privilege, a state statute designed to prohibit eavesdropping cannot be used by a trial court to shield conversations which may on cross-examination impeach a prosecution witness or establish the defendant's innocence.

Fairness and justice require that one accused of criminal conduct be afforded the opportunity without interference by the court to use any evidence which is proper and may tend to show his innocence. The tapes were proper. Whether they were helpful, this court cannot determine because of their swift disappearance from the trial arena. I would, therefore, remand the case for an *in camera* hearing to determine their relevance for purposes of impeachment. This is the procedure the trial court should have adopted when the tapes were presented even though defendant's counsel did not formally move for such a hearing. The suggestion that such a hearing be conducted was implicit, however, in counsel's statement that he was tendering the tapes to the State's Attorney so that he could listen to them. The next step in orderly trial procedure would have been an *in camera* hearing upon the State interposing any objection to their use.

If at the *in camera* hearing it developed that the tapes were relevant, the defendant would then be entitled to a new trial.

APPENDIX B

Order Of The Supreme Court Of Illinois Denying Leave To Appeal

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

I, CLELL L. WOODS, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said court this 4th day of December, 1975.

/s/ Clell L. Woods, *Clerk,*
Supreme Court of the State of Illinois.

APPENDIX C

14-1. § 14-1. Definition.] (a) Eavesdropping device.

An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means; Provided, however, that this definition shall not include devices used for the restoration of the deaf or hard-of-hearing to normal or partial hearing.

(b) Eavesdropper.

An eavesdropper is any person, including law enforcement officers, who operates or participates in the operation of any eavesdropping device contrary to the provisions of this Article.

(c) Principal.

A principal is any person who:

(1) Knowingly employs another who illegally uses an eavesdropping device in the course of such employment; or
(2) Knowingly derives any benefit or information from the illegal use of an eavesdropping device by another; or
(3) Directs another to use an eavesdropping device illegally on his behalf.

14-2. § 14-2. Elements of the Offense.] A person commits eavesdropping when he:

(a) Uses an eavesdropping device to hear or record all or any part of any conversation unless he does so with the consent of any one party to such conversation and at the request of a State's Attorney; or

(b) Uses or divulges, except in a criminal proceeding, any information which he knows or reasonably should know was obtained through the use of an eavesdropping device.
Amended by P.A. 76-1110, § 1, eff. Aug. 28, 1969.

14-3. § 14-3. Exemptions.) The following activities shall be exempt from the provisions of this Article:

(a) Listening to radio, wireless and television communications of any sort where the same are publicly made;

(b) Hearing conversation when heard by employees of any common carrier by wire incidental to the normal course of their employment in the operation, maintenance or repair of the equipment of such common carrier by wire so long as no information obtained thereby is used or divulged by the hearer;

(c) Any broadcast by radio, television or otherwise whether it be a broadcast or recorded for the purpose of later broadcasts of any function where the public is in attendance and the conversations are overheard incidental to the main purpose for which such broadcasts are then being made;

(d) Recording or listening with the aid of any device to any emergency communication made in the normal course of operations by any federal, state or local law enforcement agency or institutions dealing in emergency services, including, but not limited to, hospitals, clinics, ambulance services, fire fighting agencies, any public utility, emergency repair facility, civilian defense establishment or military installation. As amended by act approved Aug. 20, 1965. L.1965, p. 3198.

14-4. § 14-4. Sentence.) Eavesdropping is a Class A misdemeanor.
Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

14-5. § 14-5. Evidence Inadmissible.) Any evidence obtained in violation of this Article is not admissible in any civil or criminal trial, or any administrative or legislative inquiry or proceeding, nor in any grand jury proceedings; provided, however, that so much of the contents of an alleged unlawfully intercepted, overheard or recorded conversation as is clearly relevant, as determined as a matter of law by the court in chambers, to the proof of such allegation may be admitted into evidence in any criminal trial or grand jury proceeding brought against any person charged with violating any provision of this Article. As amended by act approved Aug. 24, 1965. L.1965, p. 3198.